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ABSTRACT

The impact of lowered age of majority on higher education is discussed in this report. After reviewing the concept of majority and related principles of constitutional law, four areas of possible impact are considered. The first section deals with the determination of financial need for the independent adult student, the second with the question of nonresident tuition, and the third with the impact of a reduced age of majority on required dormitory residence. These three areas involve significant issues in financing higher education. The fourth section reviews a variety of legal contracts between institutions and their students that may also be affected by the lower age of majority. Examples include contracting with adult students, notifying parents when a student is in academic difficulty, and obtaining parental consent for medical treatment. (Author)

THE LOWERED AGE OF MAJORITY: ITS IMPACT ON HIGHER EDUCATION

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ASSOCIATION OF AMERICAN COLLEGES
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FOREWORD

It is doubtful that even the proponents of the Twenty-sixth Amendment appreciated the far reaching impact of its enactment. The amendment itself simply extended the franchise in national elections to all citizens over the age of eighteen, but it has triggered a wholesale revision of state laws affecting nearly every aspect of legal majority. Although varying somewhat from state to state, one very important affected area is that involving a wide range of institutional policies in our colleges and universities.

To help administrators and others better understand the changing legal context within which present institutional policies must be revaluated, the Association of American Colleges invited David J. Hanson to review the effect of these statutory changes on higher education. Beginning with a "mini-lesson" on constitutional law, Mr. Hanson has explored the possible impact of 18 year-old adult status on parental responsibility and the evaluation of financial need, residency status and out-of-state tuition, required residence hall living, and a variety of other institutional policies. Though he recognizes that recent changes in the law may give rise to a number of philosophical, political, and social policy questions. Mr. Hanson has focused his inquiry on the legal issues currently involved and the possible future trends in the law as evidenced by recent court decisions.

Mr. Hanson is Assistant Chancellor and Legal Counsel for the University of Wisconsin-Madison, and an active member of the National Association of College and University Attorneys. He has had extensive experience in the field of higher educational law.

As director of this project Mr. Hanson was assisted by an advisory task force which included: Howard R. Bowen, R. Stanton Avery Professor of Economics and Education, Claremont University Center; Peggy Heim, Associate Director, National Center for Higher Education Management Systems; John S. Hoy, Vice Chancellor for Student Affairs, University of California-Irvine; Maurice B. Mitchell, Chancellor, University of Denver; James M. Moudy, Chancellor, Texas Christian University; Robert O'Neil, Vice President for Academic Affairs, University of Cincinnati; George N. Rainsford, President, Kalamazoo College; Richard D. Stine, Director of Undergraduate Programs, Wright Institute; Elden T. Smith and John W. Gillis, Executive Associates, Association of American Colleges. Financial support for the study was provided by the Arthur Vining Davis Foundations, Lilly Endowment, Inc., and the Association of American Colleges Special Fund.

Frederic W. Ness
President
Association of American Colleges

INTRODUCTION

This monograph is written for the layman. It is meant to trigger questions about and reexamination of institutional policies as much as it is to inform. To the extent that generalizations have been drawn, precision has had to suffer; to the extent that simplification of issues has occurred, sophistication has suffered. What follows is no substitute for careful, focused legal research and advice in response to particular circumstances on each campus. Moreover, much of what is said will give little comfort to those who would ask for certainty; the sole assurance that can be given is that many college regulations and policies will be subject to continuing judicial scrutiny because of the amounts of money involved and the fact that some individuals are preferred over others (or derive greater benefits) from those regulations.

Further, whatever the precise legal consequences of the reduced age of majority, it may well be that the social and political ramifications will have far greater impact. If adult students perceive that they are not being treated as adults, or that their social opportunities are circumscribed rather than broadened by virtue of their student status, one may anticipate pressure for change. Such political, social and psychological consequences are obviously beyond the scope of this monograph.

The reader will find that a number of the issues raised are not directly related to the age of majority in a legal sense. For example, this appears to be the case with the question of who is an *independent* student for the purpose of financial aid and how we measure *independence.* These issues are, however, traditionally associated with age of majority. Furthermore, these issues must be understood in assessing the legal impact of the lowered age of majority.

The author has relied upon footnotes to elaborate and substantiate various legal concepts and principles. This has been done to allow the lay reader to assimilate the main arguments without unnecessary diversion and at the same time to provide additional information and references for college or university legal counsel or others interested in pursuing particular questions in greater detail.

After discussing the concept of majority and related principles of constitutional law, four areas of possible impact will be considered. The first section deals with the determination of financial need for the independent adult student, the second with the question of non-resident tuition, and the third with the impact of a reduced age of majority on required dormitory residence. These three areas involve significant issues in financing higher education. The fourth section reviews a variety of legal contacts between institutions and their students which may also be affected by the lowered age of majority. Examples include contracting with the adult student, notifying parents when a student is in academic difficulty, and obtaining parental consent for medical treatment.

The author, who is project director for the Association of American Colleges' research project on Higher Education and Majority at Age 18, is

indebted to AAC for its patience, support and assistance, particularly to Dr. John Gillis, executive associate at the Association, and to Mrs. Marti Patchell who provided substantial editorial assistance. Messrs. Charles F. Parthum, III, and Joseph P. Zekas, two University of Wisconsin law students, contributed their ideas and invaluable research assistance. The author would also like to thank the many college officials who took the time to provide their thoughts and perceptions in the survey which was a part of this study.

David J. Hanson

Madison, Wisconsin
February, 1975

THE CONCEPT OF MAJORITY

The Twenty-sixth Amendment to the United States Constitution, passed by Congress in March of 1971 and ratified four months later,[1] appeared to be of limited scope at the time of its introduction. It simply provided that "[t]he right of citizens of the United States, who are 18 years of age or older, to vote shall not be denied or abridged by the United States or any State on account of age."[2] However, the pressures and the reasoning which led to the adoption of that amendment also led to revision of the age of majority in forty-four states.[3] Adoption of the amendment enfranchised approximately 11.3 million individual voters between the ages of 18 and 21. Two states, Georgia and Kentucky, had previously legislated changes in their age of majority.[4] Concurrent with or closely following the adoption of the amendment, forty-two additional states reduced the legal age of majority in one or more respects.[5]

Majority is not a concept of general application. Age limitations have previously been fixed on such rights and privileges as the ability to make legally binding contracts, marry without parental consent, consent to medical treatment, own property, engage in certain occupations, vote, and consume alcoholic beverages. These restrictions have commonly been set by specific state statutes, although several states have established them by state constitutional provisions. Similarly, state statutes set varying criminal penalties based on the age of the offender. The age of majority with respect to these and other privileges was highly variable both within and among the states even before approval of the Twenty-sixth Amendment and the concurrent changes in state laws. For example, a state would commonly set different minimum age requirements for the related undertakings of obtaining a driver's license, purchasing a vehicle in one's own name, and contracting for automobile insurance. Similarly, a state might set one age at which a person might marry without parental consent, yet retain another at which a person could give consent for medical treatment; a woman might be permitted to marry at age 18, but not obtain medical treatment for either herself or her child without the consent of *her* parents until age 21.

It was upon this frequently inconsistent structure that the legislative changes following the adoption of the Twenty-sixth Amendment were superimposed, usually by reducing the age of majority for most purposes from 21 to 18 or 19. Each of the forty-four states which have reduced the age of majority in their jurisdictions have done so within the framework of their own prior legislative and constitutional enactments. The method of change has followed one of three models. In a number of states, the statutory definition of such terms as "majority," "minority," "adult," and "child" were altered in order to change all relevant age restrictions.[6] A second method also involved redefining these terms, but specifically listed the statutes and subject areas affected by such changes.[7] The third method individually amended each statute in which the legislature wished to change the age of majority.[8] The

latter two approaches allowed state legislators to address particular issues separately. A legislature might generally reduce the age of majority to 18 (*e.g.*, making contracts, owning property, and giving consent for medical treatment), but continue to insist that 19, 20, or 21 was the appropriate age for the purchase and consumption of liquor, marriage without parental consent, or similar matters.[9]

As a result, little improvement in uniformity has resulted from legislative consideration of the age of majority following the Twenty-sixth Amendment. Many states retain differing minimum ages, depending upon the particular *rights* involved. Furthermore, states have not been consistent in selecting a new age of majority; although age 18 is most common, several states have set their new age of majority at 19.[10] Indeed, if any generalizations are possible, it may be that inconsistency among jurisdictions is more likely than not follow recent legislative changes.

No particular purpose would be served by reviewing in detail the laws of all fifty states; however, one can generalize that wholesale changes have occurred lowering the age of majority in nearly every state for a wide variety of purposes, usually including the right to own property, make contracts, and be treated generally as an adult in the courts. A significant proportion of these new adults are currently enrolled in institutions of higher education.[11] These students enter into contractual agreements with institutions which involve not only educational and social relations, but also a variety of significant *legal* interactions. The assessment of financial need in apportioning student aids, determination of residency for purposes of assessing tuition, provision of medical treatment, and the enforcement of regulations once justified by the doctrine of *in loco parentis* may all be threatened by the change in the legal status of the student from "child" to "adult," a consequence of the lowered age of majority.[12] However, there is little evidence that the state legislators who adopted these changes foresaw the effects on higher education of either the adoption of the Twenty-sixth Amendment or the legislated changes in the age of majority. The task of recognizing the import of these changes and integrating them into institutions of higher education must then fall to the college and university officials, or, where they are unsuccessful, to the courts.

AN OVERVIEW OF CONSTITUTIONAL ISSUES

For most of their history, educational institutions, both public and private, have been reasonably free from judicial scrutiny of their internal policies. Indeed, until recently, educational practices which are unthinkable by today's legal principles were blithely approved by the courts as within the discretion of administrators and governing boards. However, following World War II, the courts became increasingly involved in evaluating the legality of educational policies. In part, the impetus to this judicial intervention was the Fourteenth Amendment's prohibition against racial segregation: While initially resolved by examining state statutes,[13] courts increasingly were compelled to examine racially neutral college regulations which had the effect of continuing past segregation.[14] Subsequently, the need for judicial protection of faculty members' constitutional rights further intruded the courts in the area of college policies.[15] Other important changes occurred in the internal structure of the colleges and universities. One important development was the increased age of post-War college students, a product of both veterans benefits and the growth of graduate study. Furthermore, the increased size of educational institutions decreased the familiarity among students, faculty and administrators which previously facilitated non-judicial resolution of disputes. For these and other reasons, there has been an observable increase in the amount of litigation, and the courts are now very much involved in reviewing college and university actions.[16]

The precise nature of the relationship between the college and its students is not yet settled. In two cases recently decided by the United States Supreme Court, actions by a college to restrict on-campus political activity by students,[17] and disciplinary sanctions against a student responsible for an allegedly "obscene" publication[18] were found to be unconstitutional. Even so, in both cases the Court indicated that students, especially minor students, might constitutionally be subjected to more restrictive standards of conduct than non-students of the same age.[19] Further complicating the analysis is the fact that the courts have only recently begun to examine institutional rules in the context that most college and university students are now legal adults.

Generally, challenges to college and university regulations under the United States Constitution[20] will be brought under the aegis of the Fourteenth Amendment. Under the Fourteenth Amendment, a statute or regulation may be challenged under either of two theories: first, that the statute or regulation violates *due process of law*; or second, that it denies the *equal protection of the laws.* A brief review of the controlling principles involved in due process and equal protection arguments will assist the reader in understanding objections which may be raised against university policies which relate to age of majority. However, before the issues of due process or equal protection can be considered, the constitutional requirement of *state action* must be examined.

THE REQUIREMENT OF STATE ACTION

In order to claim the constitutional right to due process and equal protection under the Fourteenth Amendment, a plaintiff must demonstrate that their denial has resulted from action taken by a governmental or quasi-governmental body.[21] This requirement is set forth in the Fourteenth Amendment as follows: "Nor shall *any State* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[22] Normally, the acts of *public* colleges and university officials will fall within the bounds of *state action.*

In private institutions the situation is less clear. Certain acts of private college or university officials may constitute state action under the Fourteenth Amendment if it can be shown that the acts themselves or the institutions manifest a significant degree of state involvement. The quantum of state involvement required is unclear. The mere licensing or incorporation of a private institution by a state does not make the acts of the institution state action.[23] Nor does the fact that a governmental agency is engaged in activities similar to those performed by the private institution require a finding of state action.[24] However, conduct that is formally private may become so entwined with governmental policies or so impregnated with governmental character as to become subject to the limitations of the Fourteenth Amendment.[25] If a private institution undertakes the performance of a public function, and then acts in a fashion inconsistent with constitutional guarantees, a court might rule that the private college is subject to Fourteenth Amendment constraints under the state action doctrine. For example, if a private institution required all of its students to live in college-operated on-campus residence halls, but forbade members of a religious group from distributing literature in these residences, such a situation might involve state action and thus enable the court to examine the constitutionality of the prohibition under the First and Fourteenth Amendments.[26]

The precise outlines of the state action concept are not fixed. The obvious reluctance of the courts to impose constitutional limitations on private institutions has resulted in a body of law far too complex for detailed discussion here.[27] It is fair to say that state-supported public university functions and some private college activities may involve a sufficient degree of state action to subject college officials and their acts to constitutional scrutiny under the Fourteenth Amendment.[28]

THE PROTECTION OF THE DUE PROCESS CLAUSE

When a person has an interest which is identified as involving his of her "liberty" or "property" rights, the state (or a person or organization acting for the state) may not limit or withhold that interest unless it affords due process of law. As college administrators are now keenly aware, interests of liberty and property are involved in student disciplinary decisions[29] and in questions of faculty retention.[30] Furthermore, the argument that education is a *privilege* and hence that a student has no *right* to enroll in, or attend, a college or university does not relieve institutions from respecting constitutional guarantees.[31]

What is due process? The concept is flexible, and its requirements will vary with the particular circumstances in which a case arises. In disciplinary or criminal cases, there are usually a number of elements: A person may not be penalized unless he or she (1) violates an existing rule, statute, or ordinance which is (2) written in clear and understandable terms, and (3) duly enacted by a proper legislative body; the finding of the violation (4) must be by an impartial forum (5) only after the accused has received adequate notice of the violation charged, and been given an opportunity to present a defense. These are the procedural protections of the Due Process Clause. A person may also challenge the substance of a regulation or law under the Due Process Clause; when the substance is challenged, a regulation will be held invalid only if it bears no reasonable relationship to a legitimate governmental purpose and hence is arbitrary or capricious. Thus there are two substantive arguments a person can bring against a regulation under the Due Process Clause: first, that the regulation was not enacted for a legitimate governmental purpose, or second, that the means adopted to advance that purpose are not rational.

A recent development has been the emergence of the *irrebuttable presumption* doctrine, a procedural defect which invalidates regulations which deprive persons of the opportunity to explore the facts established by the presumption. Where such an irrebuttable presumption adversely affects fundamental rights it will be carefully analyzed.[32] A recent example of an irrebuttable presumption case involved maternity leaves. A school board regulation required pregnant teachers to take a leave after a certain stage of pregnancy. The Supreme Court held the regulation unconstitutional, as it created an irrebuttable presumption which did not provide the teacher the opportunity to demonstrate a continued capacity to teach.[33] Many regulations create such irrebuttable presumptions. Because the irrebuttable presumption doctrine is of relatively recent origin, there is no certain answer as to which may be valid and which may not.

THE EQUAL PROTECTION CLAUSE

The Equal Protection Clause may be violated when a regulation establishes different classes of individuals who receive different treatment. For example, a regulation providing that all persons under age 21 must live in dormitories creates two classes: those under and those over 21. Differing treatment is accorded the two classes. Under the Equal Protection Clause the test is very similar to that under the Due Process Clause discussed earlier: Is the classification reasonably related to the purpose of the regulation, and is the result the regulation is intended to achieve permissible?

Because the judicial function is to review existing laws, and not to write new ones, courts confronted with a challenge under either the Equal Protection or Due Process Clauses start with a *presumption of constitutionality* in favor of the statute or regulation and the means (or classifications) it uses to achieve its end. Under this traditional form of analysis, rule-makers are given wide latitude in their choice of both the means and the substance of their rules. The result of this presumption of constitutionality is that a rule seeking to achieve a legitimate end will be held constitutional, even if it is not the most ideal means of achieving that end, or causes inconvenience

or burdens which a better drafted rule would avoid. However, a plaintiff can overcome the presumption of constitutionality by showing that there is *no* rational relationship between the means adopted in the regulation and the end to be achieved: for example, if the classifications under a regulation treat two essentially identical groups of individuals differently on grounds wholly unrelated to the purpose of the rule. If the plaintiff can make this showing, the presumption of constitutionality is rebutted, and the regulation will be held unconstitutional.

Moreover, if a plaintiff can show that a regulation infringes upon a *fundamental right* (such as the right to vote,[34] access to the courts,[35] interstate travel,[36] and of course the First Amendment rights of free speech, press, and association[37]), or that *suspect criteria* (such as race,[38] religion,[39] or national origin[40]) have been used to classify groups for different treatment, the presumption of constitutionality is *reversed*, and there is a new presumption that the regulation, unless absolutely essential, is unconstitutional. This "strict scrutiny" analysis would be applied, for example, where a state conditioned or denied access to governmental benefits and activities such as education on the basis of race or national origin.

Although rules or regulations which impinge on fundamental interests or involve suspect classifications are subjected to the test of strict srutiny, they may survive that test. If the governmental agency can demonstrate that the regulation is *necessary* to achieve a *compelling state interest*, and that less drastic means for achieving that interest do not exist, the regulation may be sustained.[41] However, in over thirty years only one regulation examined by the Supreme Court has survived the test of strict scrutiny,[42] and both commentators and members of the Court have indicated that decision was probably erroneous. In short, the *fundamental interest* or *suspect classification* label dictates the result.

In each of the specific areas discussed below questions may be raised under both the Due Process and Equal Protection Clauses. However, several caveats are in order. First, most of the discussion must be by analogy, since very few decided cases directly involve the issues at hand. Second, some of the analogous cases may have limited predictive value, since the underlying legal theories on which these decisions were based now appear to be under re-examination by the Supreme Court. Third, many of the decisions cited are those of the lower federal and state courts, and are always subject to review and reversal by the Supreme Court. Furthermore, other Supreme Court decisions may alter or amplify the legal principles upon which those decisions were based. Fourth, nearly all cases decided in the higher education area were decided prior to the change in the age of majority in most jurisdictions; whether the fact that the students concerned were legally adults or not might have an effect on the courts' decisions in such cases is never clear. Finally, even where cases have been decided in areas of direct interest to this study, the skill of an individual advocate or a unique set of facts may have significantly influenced the court's decision and thus limit the application of the decision.

DEPENDENCY AND THE FAMILY UNIT

AN OVERVIEW

Public and private higher education derive financial support from a variety of sources. Many colleges and universities, especially the private institutions of higher education, are heavily dependent upon student tuition and fees to finance their educational programs. They also derive income from charges to students for the variety of other services they provide, including campus housing. Many students depend upon financial aid to meet these educational costs. Students obtain financial aid from a variety of sources, public and private, including the federal and state governments.

The amount of available student financial aid from all sources has never come close to meeting the estimated cost of obtaining an education. This is particularly true if the student's foregone income is included in the calculation of educational costs.[43] Even though it is a desirable goal, there has always been difficulty in equitably apportioning this limited financial aid among students. At most colleges and universities two principles have been used to allocate need-related student financial aid. These principles are: first, that parents are expected to contribute according to their means, taking into account their incomes, assets, number of dependents, and other relevant information; and, second, that financial aid should be offered only after it is determined that the resources of the family are insufficient to meet the student's educational expenses.

A detailed discussion of each of the separate state and institutional financial aid programs is beyond the scope of this monograph. However, an examination in some depth of a representative federal program in this area will serve to illustrate the principles involved. Guidelines similar to those developed at the federal level have often been adopted wholesale for comparable state and local programs and are also applied by institutions in administering financial aid.

Recently developed guidelines for the Basic Educational Opportunity Grants (BEOG) program define the independent student as one who:

> *(1) Has not and will not be claimed as an exemption for Federal Income Tax purposes by any person except his or her spouse for the calendar year(s) in which aid is received and the calendar year prior to the academic year for which aid is requested,*
>
> *(2) Has not received and will not receive financial assistance of more than $600 from his or her parent(s) in the calendar year(s) in which aid is received and the calendar year prior to the academic year for which aid is requested, and*
>
> *(3) Has not lived or will not live for more than 2 consecutive weeks in the home of a parent during the calendar year in which aid is received*

and the calendar year prior to the academic year for which aid is requested.[44]

To be eligible for BEOG and other federal grant and loan programs, a student must demonstrate independence in his own right or the inability of his parents to finance his education, regardless of age. The regulations do not specify a particular cut-off age; it is possible both theoretically and actually to have a 35 year-old dependent student and a 19 year-old independent student.

For some considerable time the average age of undergraduates in higher education at the time of graduation has been well in excess of age 21. Thus, even prior to lowering the age of majority, many students who were adults under state law were being treated as dependent on the family unit for financial aid purposes unless they could meet the criteria set by the guidelines. In most states revision of the legal age of majority included specific determination of the age beyond which parents are no longer responsible for the acts of their offspring. In general, this age was lowered from 21 to 18 or in a manner similar to other reductions in the age of majority. We now find ourselves in a situation where the great majority of undergraduates, as well as graduate and professional students, are adults under state law. These students find themselves in the anomalous position of being required by financial aid regulations to look to their parents for support, while parents have no legal obligation to provide that support. Peculiar local statutory provisions and possible conflict of laws may cause further complications.

It is important to note that the federal guidelines are not specifically dependent upon the existence of a binding legal obligation on parents to provide support to the student. The legislative and administrative intent of the guidelines appears to be that a family unit should exhaust its own resources before turning to the federal government for assistance in financing educational costs. This legislative philosophy will likely be subjected to increasing question and challenge in the courts. The issue may be stated this way: Does the reduction in the age of majority from 21 to 18, particularly where accompanied by unequivocal removal of the parental obligation to support, make it impossible to administer a program of loans and grants which looks to family income as a resource in determining need? The answer to this question may not be related to the change in the age of majority. A student over age 21 who is still dependent under the rules has the same claim. However, because the lowered age of majority likely will vastly increase the number of potential claims, this question has become the subject of considerable national attention.

THE INDEPENDENT STUDENT REGULATIONS AND THE EQUAL PROTECTION CLAUSE

The Equal Protection Clause may provide a basis for challenging the classification scheme and differential treatment of dependent and independent students.[45] In using this analysis the court must first decide whether to apply the traditional relaxed standard of evaluation or whether strict scrutiny is required. Strict scrutiny is called for if either a suspect classification or a fundamental interest is involved.

Do the federal and other programs of financial aid utilize suspect criteria in awarding these educational benefits? While one might argue that wealth-related criteria are themselves suspect,[46] here the distinctions based on wealth are used to determine remedial action—the provision of financial aid on the basis of need for the purpose of increasing educational opportunity. Wealth has not been determined to be a suspect criteria and the remedial aspect of the criteria is likely to prevent the application of strict scrutiny in such "social legislation."[47] Of course, financial aid regulations which discriminate on other recognized suspect criteria such as race or national origin would be impermissible, but present regulations do not suffer from such constitutional infirmities.

Whether the administration of financial aid programs involves a fundamental interest is a particularly interesting question, although this matter appears to have been decided in the recent case of *San Antonio Independent School District v. Rodriguez.*[48] In that case the Supreme Court reviewed the operation of the Texas public school financing statutes as they related to the equality of educational opportunity. The plaintiffs in *Rodriguez* asked that the Court hold that education was a fundamental right; the Court declined to so rule, stating that even if a certain minimum level of education was necessary to the exercise of certain other fundamental rights (for example, voting), education beyond such a minimum was not a fundamental right itself. *Rodriguez* would seem to answer persuasively the contention that a right to financial aid for the purpose of going to college is a fundamental interest, as access to financial aid for the purpose of going to college is far different from the minimum level of opportunity discussed in *Rodriguez.* Although this may well be the ultimate conclusion, the analysis is not completely airtight.

For example, in *Rodriguez* the plaintiffs were not denied an opportunity for an education, nor were they able to demonstrate substantial qualitative differences in the education available in districts receiving varying levels of taxpayer dollar support per student. Is the student in higher education in a different situation? A student could argue that to the extent that the rule operates to deny aid he is indeed *prevented* from obtaining an education. If the court were persuaded by this distinction, and applied strict scrutiny, the present regulations would very likely be held unconstitutional. However, the courts may not give great comfort to student claims in this area. The Burger Court appears to be reluctant to expand the notion of fundamental interest much beyond its present scope,[49] although the Court may respond differently at a later date.

If access to financial aid is *not* deemed to be a fundamental interest, and no suspect criteria are involved in its operation, a court may still determine that the effect of the regulations is irrational and not in support of their primary purpose either under traditional equal protection analysis or under the Due Process Clause. Under the BEOG regulations quoted above, a student who lives at home for a period of more than two consecutive weeks during the year (including vacations and the summer) may not claim independent status. However, suppose a student from a relatively wealthy family does live at home during a winter vacation but receives no additional support from his

parents for school or any other purpose. Further, assume that the vacationing student works to earn money for educational expenses. The student, if he met all the other criteria, would still be disqualified from guaranteed loans and grants in the amount of approximately $1,400 because the regulations would classify him as dependent. Even though the student challenging this regulation would bear the burden of showing that the effect of this regulation is irrational, the presumption of constitutionality would not absolutely foreclose the possibility of success, particularly if the financial aid community itself is in general agreement that the rule is less than ideal.

DUE PROCESS AND THE DEPENDENCY TEST

The difficulty in applying the equal protection analysis has not deterred the courts from deciding cases which pose questions of fiarness in the application of social and economic regulations. The courts are also willing to evaluate such regulations under the Due Process Clauses of the Fifth and Fourteenth Amendments.

The due process issue in the independent student regulations may be put in the following way: Does it violate due process to include the evaluation of parental resources in determining access to a governmental benefit, where parents no longer have the legal duty to expend resources on their offspring and choose not to do so? If the means of assessing dependency rests upon an assumption of continued parental support which is contrary to fact, it may deny a deserving student support to which he would otherwise be entitled. Such a regulatory scheme may be vulnerable to attack where the student is unable to contest the assumption of continued parental support, that is, where the test of dependency creates a conclusive or irrebuttable presumption. In a variety of cases the Supreme Court has held unconstitutional on due process grounds statutes and regulations which create such irrebuttable presumptions.[50]

In the emerging irrebuttable presumption analysis of the Court, the nature of the benefit which the presumption operates to withhold must be "fundamental." However, the stringent definitional limitations on "fundamental interests" used in equal protection analysis seem inapplicable under due process, and access to a college education qualifies as a sufficiently important interest to invoke due process protection. *Vlandis v. Kline*,[51] one of the first cases decided on grounds of an irrebuttable presumption, involved nonresident tuition payments, a functionally similar issue. Moreover, access to education made possible by financial assistance will invariably affect access to occupation, another sufficiently important interest to invoke this form of analysis.[52]

The statutory intent of the student financial aid program is to provide a fair apportionment of limited resources so as to maximize educational opportunity.[53] Since this is the case, those *most* in need should have first claim on available resources. Students who have other sources of support available should be discouraged, if not precluded, from utilizing these resources. At the same time, the allocation of these resources should take place with a mini-

mum of administrative cost. Currently, BEOG and similar programs accomplish these multiple goals through the use of the conclusive tests noted earlier, *e.g.*, the presumption that a student is a dependent if he resides with his parents for two consecutive weeks at any time during the year (and potentially nearly two years) prior to the time aid is requested. Should a student fail to meet this criterion, he is disqualified from consideration as an independent student, even if otherwise "independent," not receiving support from his parents, and in need. Similarly, the student will be disqualified from consideration as an independent student if claimed as an exemption for income tax purposes during the prior year, or if he received $600 or more from his parent(s) during the preceding calendar year.[54] If his parent(s) are found unable to provide support for his college education this classification makes no difference.

The change in the age of majority is likely to add some impetus to challenging the constitutionality of these presumptions. Commonly, students are enrolled in high school prior to and at the time of their eighteenth birthday. They reside at their parents' home, and take advantage of inexpensive or free public education. College represents a far more significant expense, often involving separate living expenses and tuition. Many (if not the majority) of students will become legal adults during or shortly after completing high school and prior to entering college. During their high school period they will be the legal responsibility of their parents, who must, in most jurisdictions, provide for them. By the time they enter college this legal responsibility of their parents will likely cease, yet BEOG and similar regulations will presume conclusively from their legally required support in past years a continuing support which is not legally required, and which may be a far more significant financial burden.

For example, if the parents claim the student as a tax deduction or contribute more than $600 to his support the student will be classified as a dependent and an irrebuttable presumption that the student can obtain additional support from his family is created. Such a presumption may indeed be contrary to fact in many instances. The parents may have claimed a tax exemption to which they are not legitimately entitled. Being under no obligation to furnish support for educational purposes, the student's parents may flatly refuse to do so--most college financial aid officers are aware of cases where parents have refused to finance occupational goals they disagree with. A student in either of these cases may argue that these presumptions prevent him from obtaining a governmental benefit to which he would otherwise be entitled on the basis of need.

Similarly, the *two consecutive* weeks regulation may be challenged as having nothing to do with need, particularly since it applies not only to the current year but to the preceding year as well. Furthermore, the student may argue that the Office of Education and educational institutions have other reasonable ways to determine whether parental resources are in fact available to students. For example, affidavits, hearings and other measures could be devised to evaluate available parental support in relation to actual need.

These potential infirmities in the current federal regulations could be

addressed in one of two ways. The regulations could be continued in their present form with the strong probability of a future court test. Or they could be changed to avoid the difficulties inherent in irrebuttable presumptions. One limited avenue of change would be to simply remove the prior support criterion. Then parents would only be asked the amount of support which they actually intend to provide in the coming year. A less drastic revision would leave the substance of the regulations intact but convert them to "guidelines," allowing the presumptions created to be rebutted. These approaches suffer from some practical difficulties. First, they run contrary to the rationale suggested previously, since they would encourage parents not to contribute to the student's educational costs. Second, the present regulations have the advantage that the determination of whether, for example, the student has been claimed as a dependent on a tax return is objective, whereas the alternatives would require the difficult and less reliable appraisal of the actual availability of family resources.

Our present system of financial aid determinations requires some initial determination of the resource pool to be measured. The "independence" question only determines the resource unit to be measured—*not* the available resources or actual need. In the case of the student from a well-to-do but non-contributing family this initial resource unit question will be the critical factor in whether aid will be available. This category of student is the primary loser under the current regulations. The student who comes from a non-contributing poor family loses nothing by having family resources counted. Thus it seems likely that under the alternative more students who are not needy might obtain aid as compared to the few needy students who are now ineligible for aid under present regulations. One has difficulty in arguing that the means chosen is not a rational, if not the most rational, means of determining dependency. Is it true that there is no rational connection between parental support in one period of time and parental support in the future? It would seem that the present presumption is both sociologically correct and good social policy. Evidence may be available to show that the presumption does in fact create its own truth, and that the lack of government-provided financial aid for the dependent student actually strengthens the ties of dependency. The emerging issue may very well be to what end the government must go in providing a *more* rational scheme of allocation of federal resources in education as opposed to merely providing a rational one.

Moreover, substantial additional administrative burdens would be involved if the regulations were established as guides, or rebuttable presumptions, but students were permitted to challenge the presumptions at a hearing, although such a step would remove the primary objection under the Due Process Clause.[55] To the extent that financial aid officers have the ability to use institutional funds, state funds and other funds to balance the effect of the criteria, the effect of the present regulations is tempered and a particular institution's *overall* aid program may operate as if the presumptions were rebuttable. The issue may well turn on the extent to which individual programs stand alone and will be analyzed individually. The effect of the irrebuttable presumptions involved on individuals is likely to be more visible in

the so-called entitlement programs (*e.g.*, BEOG) than the institutionally-administered programs. However, it is precisely these nationally-administered entitlement programs which have the greatest need for certainty.

If we could assume that all students had access to loan money (ignoring the cost) then the regulations would not operate to exclude persons from higher education, only to shift certain individuals away from the more desirable forms of aid (grants, guaranteed loans) toward the less desirable forms (institutional loans, private borrowing). Viewed in this light the present system seems rational and defensible on an overall basis. However, there is still the nagging question of applying any standard, regardless of how theoretically rational it might be, to every case without any opportunity to show that the particular case does not fit the overall design.

SUMMARY

For a variety of reasons, perhaps the safest prediction in this area is that the dependency regulations will be challenged, and that when challenged some judicially-mandated adjustment will occur under the Due Process Clause which preserves the thrust of the regulations but permits some tempering of their effect in unusual cases by allowing the presumption to be rebutted. However, safe predictions may not always be accurate. In defense of the present regulations it must be said that they appear to be good public policy in a time of limited resources and that, *Vlandis* notwithstanding, the interest at issue here is substantially different from the interests at stake in the irrebuttable presumption cases involving welfare and employment.[56] The courts are not likely to lightly upset the present system. Moreover, the regulations operate to postpone "independence" but do not absolutely preclude its achievement. Students and parents, by careful planning, can make the decision for themselves. Certainly challenges on related equal protection grounds will be less likely to succeed since strict scrutiny is inappropriate in this situation.

Regardless of the legal outcome, financial aid officers are noting a marked increase in the number of *independent* students. A recently-conducted College Entrance Examination Board study discovered that "the administration problem associated with the self-supporting student is viewed as a serious problem."[57] The precise role of the lowered age of majority on this phenomenon (as opposed to inflation, student age, the impact of program funding choices, etc.) is unclear, but there is no doubt that it has had some impact on the perceptions both of students and their parents as to available options.

RESIDENCE FOR TUITION PURPOSES AND THE ADULT STUDENT

AN OVERVIEW OF THE PROBLEM

Public institutions of higher education have historically derived large portions of their income from state and local resources. Tuition and fees charged to residents of the state have been lower than those charged to non-residents. The differentials between resident and non-resident rates are large and increasing. The magnitude of non-resident tuition payments as a significant resource for higher education has been well documented.[58] In a 1972 study which caused widespread national concern, Carbone reported that state colleges and universities could lose between $250 and $300 million dollars in annual income if the ability to charge non-resident tuition were lost. He pointed out that more than 450,000 non-resident students were enrolled in public institutions surveyed during the fall term of 1971.[59] The loss of non-resident tuition revenues would necessitate increased state appropriations or massive tuition increases, or both. The problem is compounded by recent increases in the differential between resident and non-resident tuition in public institutions. The average differential between resident and non-resident tuition increased 89.72% or nearly $400 between the years 1965-66 and 1972-73.[60] This significant differential coupled with the present system for determining resident status creates a relatively large class of students who have a strong pecuniary interest in attacking the system.

The practical impact of a reduced age of majority on the collection of non-resident tuition is immediate and far reaching. First of all, under most state laws prior to 1971, a student was not an adult until age 21. Under most of these same laws a minor was presumed to reside with his or her parents. Thus, the bulk of undergraduate students in higher education were minors up to and including their junior year. In most instances it was relatively easy to determine where the student's parents lived, and declare the student as resident or non-resident for tuition purposes.

A different situation prevails with a reduced age of majority. An adult student may establish residency in his or her own right. At the University of Wisconsin-Madison, with which the author is particularly familiar, there has been a substantial increase in the number of appeals from determinations of non-resident status. Some of these appeals go on to court and resort to litigation seems to be increasing.

Although the focus of this discussion is on non-resident tuition, many state loan programs which differentiate between residents and non-residents are also affected. These programs are often available to students at private institutions. The impact on private institutions does not stop there, however. Private institutions may have greater difficulty in competing for students if students can easily establish in-state residence and qualify for lower tuition rates at public institutions. On the other hand, an easing of residency stand-

ards under state loan programs could result in more dollars being available to students at various institutions located in states with such programs.

NON-RESIDENT TUITION AND THE CONSTITUTION

Durational Residency Requirements

The law now seems settled that durational residency requirements of *at least* up to one year are constitutional. In the case of *Starns v. Malkerson*,[61] a three judge panel of the Federal District Court in Minnesota ruled that a durational residency requirement of one year immediately prior to registration in a particular semester was constitutional as against the claim that such a regulation was unreasonable and violated the Equal Protection Clause of the Fourteenth Amendment. The United States Supreme Court affirmed the decision without opinion.

Following *Starns*, in *Vlandis v. Kline*[62] the United States Supreme Court reviewed a Connecticut statute which had established an irreversible and irrebuttable statutory presumption against obtaining residency while being continuously enrolled in Connecticut public institutions of higher education. This case is discussed in some detail below. While the question of a durational residency requirement was not specifically at issue in the *Vlandis* case, the United States Supreme Court addressed itself to that issue in the course of its opinion:

> *We are aware, of course, of the special problems involved in determining the bona fide residence of college students who come from out of State to attend that State's public university. Our holding today should in no wise be taken to mean that Connecticut must classify the students in its university system as residents, for purposes of tuition and fees, just because they go to school there. Nor should our decision be construed to deny a State the right to impose on a student, as one element in demonstrating bona fide residence, a reasonable durational residency requirement, which can be met while in student status. We fully recognize that a State has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis.*[63]

The Supreme Court discussed durational residency requirements in a footnote citing the decision in *Starns v. Malkerson* and expressly approved the *Starns* decision, using the following language:

> *Minnesota's one-year durational residency requirement, however, differed in an important respect from the permanent irrebuttable presumption at issue in the present case. Under the regulation involved in Starns, a student who applied to the University from out of State could rebut the presumption of non-residency, after having lived in the State one year, by presenting sufficient other evidence to show bona fide domicile within Minnesota. In other words, residence within the State*

for one year, whether or not in student status, was merely one element which Minnesota required to demonstrate bona fide domicile.[64]

The *Vlandis* opinion (including the footnote citing *Starns* with apparent approval) appears to establish with undeniable force the proposition that states may impose a one-year durational residency requirement and may, in addition, use other tests to establish residence for tuition purposes.

The Supreme Court has had a more recent opportunity to confirm this view and did so in the case of *Sturgis v. Washington.*[65] In *Sturgis,* the Supreme Court let stand without opinion a three judge district court decision involving the residency statutes of the state of Washington. The statute in that case was challenged on a somewhat different basis from the statute in *Vlandis v. Kline.* In *Sturgis,* the residency statute was challenged on the grounds of equal protection, infringement on right to travel, and violation of due process of law. The district court rejected each of these challenges. Although the summary affirmation by the United States Supreme Court is not as valuable as a full decision, it does indicate, in conjunction with the language in *Vlandis,* that the court is not presently inclined to strike down durational residency requirements of up to one year. The three judge district court decision in *Sturgis* came after the United State Supreme Court's holding in *Rodriguez v. San Antonio Independent School District.*[66] The district court, relying on *Rodriguez,* specifically held that a person is not entitled to higher education as a matter of right. Consequently, the court in looking at the one-year durational residency requirement applied a relatively traditional equal protection standard, namely, whether there was a "rational, reasonable, relevant distinction between the differentiated classes."[67] This is obviously a significant holding since if higher education, and particularly access to public institutions in other states, is not viewed as a fundamental interest, reasonable, well-administered non-resident tuition statutes will almost certainly be held constitutional.

Due Process and Irrebuttable Presumptions

In *Vlandis,* the United States Supreme Court struck down a Connecticut statute which had, in part, held that an unmarried student would be classified permanently as a non-resident student if his or her "legal address for any part of the one year period immediately prior to his application for admission at a constituent unit of the state's system of higher education was outside of Connecticut."[68] The Court characterized this classification as "permanent and irrebuttable," since the statute further provided that:

The status of a student, as established at the time of his application for admission at a constituent unit of the state's system of higher education under the provisions of this section, shall be his status for the entire period of his attendance at such constituent unit.[69]

In striking down the statute the Court pointed out that the student was not permitted any opportunity to demonstrate residency as long as he or she remained a student. A series of examples illustrated that the state's purpose in

creating such a presumption was not necessarily served by the presumption.[70]

This case demonstrates that courts will strike down regulations which arbitrarily freeze a student's residence status based on facts at a particular point in time. However, the Supreme Court seems willing to allow states to impose restrictions on attaining residence for tuition purposes and to allow states to require evidence in addition to time in the state as *indicia* of residence. In *Vlandis*, the Court said the following:

> *We hold only that a permanent irrebuttable presumption of nonresidence - the means adopted by Connecticut to preserve that legitimate interest - is violative of the Due Process Clause, because it provides no opportunity for students who applied from out of State to demonstrate that they have become bona fide Connecticut residents. The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates.*[71]

The Court then went on in the following language to cite with approval the action of the Connecticut Attorney General in attempting to establish reasonable residence criteria during the uncertain period of litigation in *Vlandis:*

> *Indeed, as stated above, such criteria exist; and since Section 126 was invalidated, Connecticut, through an official opinion of its Attorney General, has adopted one such reasonable standard for determining the residential status of a student. The Attorney General's opinion states:*
>
> > *'In reviewing a claim of in-state status, the issue becomes essentially one of domicile. In general, the domicile of an individual is his true, fixed and permanent home and place of habitation. It is the place to which, whenever he is absent, he has the intention of returning. This general statement, however, is difficult of application. Each individual case must be decided on its own particular facts. In reviewing a claim, relevant criteria include year-round residence, voter registration, place of filing tax returns, property ownership, driver's license, car registration, marital status, vacation employment, etc.'*[72]

In summary then, the Court in *Vlandis* appears to approve of the system now being followed in a number of states with respect to non-resident tuition and to essentially insulate such regulations from attack. Lingering questions concerning the impact of durational residency requirements for tuition purposes on freedom of association and the right to travel seem to have disappeared.[73]

SUMMARY: THE FUTURE

Taken together, it would seem that *Rodriguez* and *Vlandis* virtually guarantee that states will be able to continue to charge differential rates between residents and non-residents for tuition purposes. However, specific litigation can be anticipated challenging the application of the general

standards to specific cases and attempting to make the one-year period a maximum, as opposed to a minimum, requirement. Carbone points out in his report the difficulty in making precise and objective judgments in this area[74] and suggests that objective standards are difficult to develop and administer.[75] In the future, the Due Process and Equal Protection Clauses will provide avenues of challenge to insure an even-handed and consistent administration of objective standards of residency. In addition, specific suits are likely to raise questions about the procedures employed by colleges and universities to make residence determinations. For example, it is likely that suits will challenge procedures which provide no opportunity for the student to present his or her case in detail or to appeal the decision. One of the advantages of the irrebuttable presumption was that it was easy to administer. While non-resident tuition revenues appear to have been partially preserved, the cost may still turn out to be significant as more and more procedural protections are engrafted onto procedures for determination of residency and non-residency. The dollar differentials between resident and non-resident rates virtually guarantee challenges and appeals in individual cases. The outcome of all this is likely to be a system which is fairer and more objective but also more expensive to administer.

REQUIRED RESIDENCE HALL LIVING

AN OVERVIEW

Time magazine,[76] the Council of Student Personnel Associations,[77] and thoughtful college administrators in both public and private institutions have expressed concern that the reduced age of majority may invalidate required residence hall living and thus jeopardize their financial status as self-supporting enterprises. This concern appears to be well founded. A number of institutions contacted in conjunction with this study reported recent litigation, or that they were then faced with court challenges to regulations requiring residence hall living, and recent cases seem to restrict an institution's power to require dormitory residence.

Commonly, institutions have required students to live in residence halls for various periods of their academic careers. While the regulations differ among institutions, students are frequently required to live in residence halls until age 21, or until the end of their sophomore (or other) year. In many cases, these rules have not been changed following the reduction of the age of majority. Usually, such rules provide for certain exceptions: veterans, married students, the handicapped, and a more general "special circumstances" category are common.

During the college enrollment boom of the late 1950's and early 1960's, massive residence hall construction occurred. Most of these residence halls were financed with revenue bonds, or money borrowed under federal programs. Revenue from the operation of these halls was expected to cover the bond obligations and other repayments. At many institutions changing conditions have drastically altered the ability of the colleges to meet these obligations relying solely on revenues from the operations of their dormitories. Enrollments have stabilized and only minimal increases are expected at the freshman-sophomore level. Non-residential junior and community colleges are educating an increasing number of freshman and sophomore students who continue to live at home. Since student life styles are changing, residence hall living appears to many students a less attractive alternative. Finally, inflated college costs have encouraged students to seek less expensive off-campus housing.[78]

The reduced age of majority has also played a significant role. Students who are adults at age 18 don't like to be told where to live. Colleges have frequently required students under age 21 to live in residence halls because that was the legal age of majority; such requirements could be justified *in loco parentis*. Students argue that the lowered age of majority now requires a change in institutional rules, yet liberalization of rules for required residence together with other economic factors will compound the financial difficulties of residence hall operation.

Unfortunately, the legal status of rules for required residence remains unsettled. Residence hall regulations can be tested in court by the same

constitutional standards as financial aid and non-resident tuition: equal protection and due process. While cases have been decided on these grounds before the lower federal courts, many of them may be of limited precedential value, as they were decided on very specific sets of facts.

THE EDUCATIONAL VALUE THEORY

As several cases demonstrate, there is no consistent rationale advanced to justify required residence hall living. Historically, some institutions have built residence halls to provide low cost, convenient and acceptable housing for students. Other institutions consider residence hall living an essential feature of their educational program. They provide resident counselors or tutors, social and recreational programs, lectures, seminars and other educational activities. Furthermore, these colleges maintain that residence hall living provides significant opportunities for social interaction among persons of varying cultural backgrounds and life styles.[79]

Pratz v. Southwestern Louisiana Polytechnic Institute,[80] involved a constitutional challenge to parietal rules requiring dormitory residence until age 21. The plaintiffs claimed that the requirement violated the equal protection and due process guarantees of the Fourteenth Amendment. The court, in an opinion by Judge Dawkins, rejected their due process claim that the rules worked an unreasonable hardship on students, as the rules on their face provided for hardship exemptions. The court also rejected the notion that the rule violated equal protection guarantees. Arguing that the rules had the permissible purpose of educational benefits, the school presented the court with affidavits from "numerous, nationally prominent educators" attesting to the educational value of dormitory living. The court accepted this evidence, and found that the specific requirement was rationally related to the legitimate educational purposes of dormitory residence.

However, *Pratz* is a peculiar case, and cannot be relied upon by college, administrators as unqualified support for residence hall living requirements. First, the case was decided prior to the change in the age of majority in Louisiana. Second, the case was decided on a motion for summary judgment: The court had before it only the rules themselves and the affidavit testimony of college officials and others as to the educational value of dormitory living. The plaintiffs offered no rebuttal to this evidence of educational value, and thus, for purposes of the motion, admitted that there was such an educational value to the dormitory living.

> *. . . Defendants' main argument is that the so-called parietal rules, as embodied in the contested resolutions, are based on the soundest of educational principles and thinking. Numerous authoritative affidavits in the record point out that educators of the highest calibre from throughout the Nation feel that the living and learning concepts espoused by the regulations have the highest educational value and should be enforced as being in the best interests of all students, present and future. . . . Further, defendants point out. . . that the exemption priorities and hardship rules established by the resolutions certainly prevent any student from being subjected to any undue problems.*[81]

We simply do not feel the numerous outstanding educators, many of national renown, who submitted affidavits in this case to the effect that the living and learning center concept is a very valuable educational tool would say so unless this indeed was their sound, professional, expert opinion. It is a travesty of a sort even to infer they would be parties to any sort of disguised scheme to protect the interests of bondholders who bought the bonds within parietal covenants to protect their investments.[82]

The holding in *Pratz* should be limited to the evidence on which it was based. *Pratz* seems to say that in the absence of proof to the contrary an asserted educational value for residence hall living will sustain reasonable regulations. Although the case was summarily affirmed by the Supreme Court, it would be inappropriate to draw much comfort from this decision in light of other developments.

THE ECONOMIC NECESSITY THEORY

In the *Pratz* opinion, quoted above, the court refused to entertain the argument that the educational value asserted was merely a "coverup" for a financially-motivated residence requirement. This rejection is very important, for several cases have held that a rule whose purpose is to "fill the dormitories" in order to meet financial obligations is in violation of the Constitution. *Mollere v. Southeastern Louisiana State College,*[83] is the first important recent decision in this area. In that case, a university regulation required women under the age of 21 to reside in residence halls. At the trial the university acknowledged that its *sole* reason for the regulation was to guarantee full occupancy of the dormitories. The court held that such a regulation violated equal protection because the effect was to place a financial burden on one group of students for the benefit of all students.

The sole issue in this case . . . is whether the college may require a certain group of students to live on-campus, not for the welfare of the students themselves but simply to increase the revenue of the housing system . . . . Is this a valid classification under the equal protection doctrine? . . . The sole reason offered by the college is that the plaintiffs comprised the precise number of students required to fill existing vacancies . . . . This is the type of irrational discrimination impermissible under the Fourteenth Amendment.[84]

In a subsequent case, *Poynter v. Drevdahl,*[85] students challenged a requirement that all students under the age of 23 reside on campus, arguing that, as in *Mollere*, the reason for the requirement was to financially benefit the college. However, the college asserted in that case that there were educationally sound reasons to require student residence in dormitories, and the regulation was upheld on the basis of Judge Dawkin's opinion in *Pratz*. The court rejected the claimed economic motivation of the school, and in dictum, seemingly rejected the *Mollere* holding, finding:

nothing sinister in the interest of a state supported university in insuring its mandatory obligation to honor its bonded indebtedness....[86]

Notwithstanding this dictum, which appears out of step with current Supreme Court decisions, as well as with the analysis in more recent cases, *Poynter,* like *Pratz,* must be read as a limited holding. Again, attorneys for the students appeared to make a significant tactical error in admitting that the regulation might have a reasonable educational benefit, and admitting for purposes of the motion that dormitories "create an environment in which students can live and work together in a community of scholarship."[87] Administrators should not assume that students' attorneys will continue to allow claims of educational benefit to go unchallenged.

COOPER AND PROSTROLLO – A MORE REALISTIC ANALYSIS?

Cooper v. Nix,[88] a case involving Southeastern Louisiana University's residence hall requirement, was also decided by Judge Dawkins, author of the *Pratz* opinion (on which *Poynter* relied). In *Cooper,* Judge Dawkins began his decision by placing clear limitations on *Pratz.*

Due to the heavy reliance by the defendants on Pratz... *it is incumbent upon this court, as the author of that opinion, to place* Pratz *in its proper perspective....*

Pratz *was a broadside and 'shotgun' attack upon the entire concept of reasonable parietal rules. The plaintiffs there argued that* no *parietal rules were valid, relying primarily on the First Amendment. The matter was heard upon stipulation of facts and affidavits by way of Motion for Summary Judgment. No 'live' evidence was taken as to the application of the parietal rules.*

Significantly, all individual plaintiffs in that case were under 21 years of age... [and] [t]here was no evidence reflecting that students over 21 were being required to live on campus, and Louisiana Tech's rules did not so require.

This judge... did not intend to indicate that the State had the right to set up parietal rules for students at State supported institutions regardless of age.[89]

Judge Dawkins then went on to describe the actual effect of the regulations at issue in *Cooper:*

The sole and only reason given for selecting the age 23 cutoff is that normally a person at such age is not expected to be an undergraduate student at SLU. It is essentially a mechanism to require all single undergraduates to live on campus if not otherwise favored with a specific exemption.[90]

The court noted that this same regulation had been challenged in *Mollere* and found invalid, and that the college was *now* asserting that "another reason [for the regulation] (which neither [the Dean] nor anyone else presented to the *Mollere* Court) was to afford students a living and learning experience of dormitory life."[91]

While this rationale had been found sufficient to support the regulation in *Pratz*, the court pointed out the inconsistent effects of the regulation to a 21 year-old senior, a 23 year-old freshman, and a 22 year-old veteran, stating that:

There was no direct testimony supporting the contention that requiring a student who is 21 years old or older to live on campus in a dormitory was reasonably related to the educational process. Certainly there was no evidence presented to support the requirement that returning military veterans living in dormitories is reasonably related to the educational process. To the contrary, expert witnesses on behalf of plaintiffs stated that requiring a student of this advanced age, and otherwise having full legal status, to live in campus dormitories was not reasonably related to the university educational process and further might prove detrimental in terms of alienation and development characteristics of maturity by 'being on their own.' While the 'living and learning' concept per se *is not challenged, the implementation of that concept at Southeastern, insofar as it requires students of full legal majority and returning military veterans to live on campus, is found not to be reasonably related to the educational process.*[92]

Having arrived at these conclusions, the result was inescapable. Judge Dawkins found it unnecessary to decide whether required residence hall living for a person of *full legal majority* denied a *fundamental right*. Applying the traditional equal protection standard, he accepted, *arguendo*, the proposition that there is some educational value to dormitory living, and that it was the educational value (rather than economic interests) that motivated adoption of the rule. Nonetheless, Judge Dawkins failed to find any fair and substantial relationship between such educational values and the actual effect of requiring 21 and 22 year-olds to live on campus.

In part, the key to *Cooper* seems to be the lack of a reasonable connection between educational purpose of the rule and the impact of the rule on persons over age 21; in essence, whatever the educational value of dormitory life in the abstract, there was little such value if adult students resented what they perceived as treatment as children, and were prevented from developing as

adults. *Cooper* was decided prior to changes in Louisiana law making persons legal adults at 18. It would be a fair inference that the result in future cases might well be influenced by the lowered age of majority.[93]

Prostrollo v. The University of South Dakota,[94] is the most recent federal court decision on the issue. There, at the district court level, the judge applied a traditional equal protection analysis *(i.e.*, is there any rational basis for the rules?) and struck down the South Dakota regulation. Like *Cooper*, the *Prostrollo* district court decision represents a change in judicial attitudes and reasoning; not only in the result reached (that the rule was held unconstitutional), but in the method of reaching that result. In *Cooper* the court examined the actual effect of the rule against its purported effect; finding the two inconsistent, it held the rule irrational and hence unconstitutional. In *Prostrollo* the court also looked behind the justifications advanced by the defendant, and demanded that abstract statements of educational benefits in dormitory living be proven by actual evidence, stating that:

> *[t]here is* no *concrete evidence in the existing record . . . that the experience of dorm* living *either 'broadens and enriches' a student's life or that it enhances his formal education in the area of personal and social development . . . .*[95]

Looking behind such justifications, the district court concluded that "[i]t is obvious from the evidence presented that the concern of the Board of Regents is financial." Rejecting the rationale propounded in the *Poynter* dicta, the court closely analyzed the relationships involved.

> *This court recognizes there are valid educational objectives behind the* construction *of dormitories . . . . While the objective behind dorm construction may be educational, the objective behind the regulation requiring freshmen and sophomores to reside in dormitories is to retire bond indebtedness and it is unreasonable and arbitrary to make only some students pay for a benefit received by all students.*[96]

Following from this finding was the district court's conclusion that the requirement was unconstitutional.

On December 6, 1974, the Eighth Circuit Court of Appeals reversed the district court and remanded the case to the district court with instructions to enter judgment for the University. The Circuit Court of Appeals found the regulation constitutional. The court accepted the University's testimony (discounted by the district court) that there were purposes for the rule in addition to repayment of the government bonds which provided capital for construction. Accepting the primary purpose of the rule as financial, the court found additional multiple purposes in that:

> *the overall evidence demonstrates that these University officials believe that dormitory living provides an educational atmosphere which assists* younger *students, as underclassmen adjusting to college life. The testi-*

mony reflects a belief that students who become "established" and well oriented in their early years are prone to develop good study habits which will assist them in their years as upperclassmen.[97]

The court went on to distinguish *Mollere, supra,* where the only justification asserted for the rule was financial. The court of appeals rejected the right to privacy and free association arguments raised by the students.

This court of appeals decision reflects a fundamental disagreement with the district court over the rational basis of the challenged rule. The district court had concluded that the statements of purpose tendered by the University supported only the decision to construct dormitories and not the rule deciding who would live there. The circuit court accepted the *belief* of university officials that educational benefits result; the district court would have required some proof of *actual* benefit. Both decisions are open to criticism in their application of the Equal Protection Clause. Other circuits, faced with this question, may not accept the Eighth Circuit's reasoning and college and university officials may not be able, in the future, to make an uncontroverted record on the educational benefits issue. The next case may well raise the *actual* benefit issue directly. The question of how much, if any, educational benefit is required to support parietal regulations is still open.

What direction can be drawn from these cases? It appears that courts will not sanction regulations which are simply intended to "fill the dorms," because the result is to make one group of students bear a disproportionate burden of financial expense and restrictions in personal liberty to reside in the accommodations to effect a benefit for all students, present and future. Second, the mere assertion of educational benefits, or that living requirements are motivated to give educational benefits, seems unlikely to be persuasive unless the institution can demonstrate such benefits. Finally, even if the institution can show evidence of education-related motivations in enacting such a requirement, the courts are likely to examine the actual operation of the regulations to determine if there is such an educational benefit.

Notably, in a number of challenges the students have argued that such restrictions interfere with their First Amendment rights of privacy[97] and freedom of association (including a right to live with whom one chooses).[98] Such issues were raised but not decided in both *Cooper* and *Prostrollo*, since other grounds were available. Recently the United States Supreme Court sustained local zoning regulations against similar attacks in *Boraas v. Village of Belle Terre.*[99] There the Court indicated that associational rights were not involved where the effect of local zoning ordinances was to prohibit groups of individuals from living together.[100] Obviously had the *Boraas* Court agreed that associational rights were infringed by the zoning ordinance, most dormitory residence regulations would be invalid, even if they furthered certain educational goals. Does the *Boraas* decision preclude such a holding in the future? Not necessarily, for in *Boraas* the question was whether an ordinance which was enacted for other reasons (planning municipal growth) which in-

directly affected such associational rights was invalid; the students in *Boraas* could live together elsewhere without violating the zoning restrictions. However, mandatory dormitory regulations may be more pervasive in their effects, requiring students to live in one particular location; hence the constitutional question is not necessarily the same. Thus the *Boraas* decision does not give support to students' challenges to required dormitory residency, or particular support to institutions seeking to maintain such regulations.

STATE ACTION

It should be reemphasized that parietal rules litigation is normally brought on the basis of the Fourteenth Amendment against state institutions which must comply with that Amendment's constraints against unconstitutional *state action*. Private institutions may well be immune from *legal* attacks on required residence regulations (although here, as elsewhere, political considerations may effect the outcome that judicial action cannot reach). Legally, the prime hurdle to a student in a private college who is forced to live in a residence hall will be to show sufficient *state action* to get into court and have the college regulation reviewed.[101]

CONCLUSION

At least in public colleges and universities, rules which require students to live in residence halls are in jeopardy. Little comfort can be offered to colleges and universities from cases thus far decided, since even favorable decisions are limited in their applicability. Several other cases are pending at this time, and they may provide more definitive answers to the questions posed.

INSTITUTIONAL REGULATIONS AND THE ADULT STUDENT

SCOPE OF THE PROBLEM

Colleges and universities have a multitude of legal and quasi-legal relationships with their students. Students contract with the college for an education, as well as for housing, food service, employment and loans. Many campuses provide health care for students, and have regulations governing their students' conduct. Institutions also have procedures to deal with violations of these regulations. Colleges and universities provide academic records and other information to students and their parents. There are two basic legal questions concerning these relationships. First, what impact has the lowered age of majority had on the contractual relationships between the institution and its students; second, what legal significance should be accorded the lowered age of majority in institutional policy-making?

In order to survey these issues, and the institutional responses to them, we sampled 100 selected institutions throughout the country, chosen at random within the following categories: (over 10,000 students) and small public institutions, and larve (over 2,000 students) and small private institutions. A number of issues such as disciplinary matters, notification to parents of students' progress, dormitory contracts, consent for medical treatment, etc., were identified and included in a preliminary questionnaire. The deans of students at nearly half the institutions sampled were interviewed by telephone. The remainder were sent written questionnaires.

No attempt was made to adjust or expand the sample to obtain a truly representative pattern among the categories (*e.g.*, small/private, large/public). Although lacking in sophistication, this sampling procedure was considered adequate for a preliminary study of these issues. In order to evaluate the range of institutional policies and responses to the reduced age of majority, student handbooks and other written regulations were obtained in addition to the questionnaire data.

The questions were divided into three categories. First, there were questions concerning the regulation of the students' personal lives, *e.g.*, mandatory dormitory residence, parietal rules, and regulation of the consumption of alcoholic beverages. The second series of questions concerned the institution's role in relationships between the student and parent, *e.g.*, notification of academic progress or disciplines. Finally, responses were sought concerning the students' relationship with the institution itself, *e.g.*, contracts.

The results of the survey were tabulated and evaluated. The compiled data indicate that very few institutions have adjusted their policies in response to new state laws lowering the age of majority; indeed, the reduction of the age of majority appears to have had little immediate impact on college and university practices. One explanation for this lack of response emerged in our early telephone interviews. Institutional policies in these areas are seldom

based on an analysis of related legal issues. Instead, they tend to reflect the educational philosophy of the institution and are often conditioned by political pressures from various constituencies including faculty, students, parents, alumni, and the local community. Several respondents did indicate that the change in the age of majority did provide them a rationale to defend conceding to student proposals that they had been previously agreeable to, but which were likely to be controversial with other constituencies; another reflection of the practical side of the college administrator's environment.

RESIDENCE HALL REGULATIONS

All but five of the responding institutions operated residence halls. More than half of them[102] require some students to reside in the halls. At a minimum, one school required students to live in a residence hall for at least the first third of their first semester, as an acclimation technique. At the other extreme was a requirement that *all* unmarried students (including graduate students) reside in residence halls. There appears to be no relationship between a reduced age of majority and these mandatory requirements. Typically, residence hall living was required of students under age 21 prior to the change in the age of majority. That rule remained in effect after the change. Students at colleges where the age of majority remained at age 21, on the other hand, were just as likely not to have mandatory dormitory residence after age 18 as were students in states where the 18 year-old was an adult.[103] Discussion earlier in this paper raised questions concerning the constitutionality of *required* residence hall living, at least in public institutions. The lowered age of majority further emphasizes the questioned legality of this policy, and several institutions contacted reported ongoing litigation challenging these requirements. Even so, responding institutions are slow to abandon traditional residence hall standards; several indicated reluctance despite their realization of likely court challenges.

In recent years many colleges and universities have liberalized or eliminated parietal rules. Curfew and compulsory signout regulations have been almost totally abandoned except for reasons of safety on some urban residential campuses; the remaining signout regulations were invariably voluntary in practice if not officially so. The lowered age of majority has not significantly influenced the change in these regulations; as with the mandatory dormitory residence requirements, there was no significant difference between schools with age 21 and age 18 majorities in these practices.

In states which have legally lowered the age of majority, 22 out of 24 of the schools surveyed permit at least limited visitation in residence hall rooms by members of the opposite sex; however, 3 of the 22 still require parental consent. Surprisingly, in states where the age of majority is still 21, 5 of the 6 residential institutions surveyed permit visitation, and 3 of the 5 have *full* or *open* visitation. Only one of these reported requiring parental consent.

Those institutions which do not permit visitation expressed concern over possible negative parental reactions. We attempted to explore this concern with schools which have adopted a visitation policy. In no instance had there been significant parental opposition to visitation (or liquor, or coed dormitories) in any institution regardless of size, regional location, or religious

affiliation. While some institutions experienced limited opposition from outside pressure groups, in no case did this result in a change of policy.

State laws do directly affect the availability of liquor in residence halls, either by retaining age 21 as the minimum age for the purchase of liquor, or by specific statutory prohibitions on alcoholic beverages in residence halls (for state institutions). No college or university had a policy less strict than current state law, but even in states where the age of majority is still 21 enforcement of rules against possession and consumption of liquor is admittedly lax except in cases of open and notorious violation. A number of schools were still in the process of changing their drinking rules in response to legislative action lowering the age of majority, and in some cases, this movement toward conformity with state law was not accompanied by much enthusiasm. On the other hand, in several schools where there was a statutory prohibition against liquor in residence halls despite an age 18 majority, the institution was pressuring the legislature to remove the ban.

How should institutions respond to students who argue that "I am an adult and you have no right to regulate my life"? The answer is largely a matter of educational policy, and does not necessarily have legal overtones. A change in state law *allowing* possession of liquor by 18 year-olds does not automatically void regulations prohibiting the possession of liquor in residence halls. Likewise, adult status and visitation rights are not immutably linked. Present practice, as indicated by the results of our survey, suggests that a wide variety of regulations persists at institutions within states which have generally accorded adult status to 18 year-olds, and the same variation occurs even where specific issues such as liquor are covered by statute. Moreover, as previously pointed out, the great majority of legal constraints on institutional rules operate on public institutions. Nonetheless, private institutions have kept pace with, or exceeded the willingness of public institutions to adjust policies in light of their students' new adult status, although they are under less legal compulsion to do so.

PARENTAL NOTIFICATION

The survey data revealed the willingness of institutions to respond to parental interest in student problems and progress, regardless of the student's age. Thirty-four percent of the responding institutions send student grade reports to parents, or send grades addressed to the student but at his parent's home. Forty-one percent notify parents of disciplinary actions, and several others have a flexible (or confused) policy regarding notification. Nearly half of the responding institutions indicate they contact parents when students evidence *serious* psychological problems,[103] while several others notify parents *only* in cases where hospitalization occurs.

As in other areas of our survey, there seems to be no clear relationship between the legal age of majority and institutional policies regarding parental notification on grades, discipline or psychological problems. In general, private or church-related colleges *are* more likely than public institutions to notify parents about grades or disciplinary matters.

What are the legal implications of the reduced age of majority on parental notification? In the absence of direct legislation on the subject, the legal

answer was unclear. However, certain provisions of the *Education Amendments of 1974*, popularly known as the *Buckley Amendment*, deal with "protection of the rights and privacy of parents and students." Those provisions include restrictions on access to students' files, and require persons and agencies desiring access to note in a student's file the basis of their interest in the material in that file. Such information as is in the file cannot be disclosed without the consent of the student.[104] Important for the question of institutional release of information to a student's parents is subsection (d) of the amendment, which provides that:

> *[f]or the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of post-secondary education,* the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.[105] (emphasis added)

Other provisions of this amendment deny funds to institutions of higher education which permit the release of "personally identifiable records or files (or personal information contained therein) of students without written consent . . . ."[106]

The Buckley Amendment, which also permits students to inspect all of their records, raises a host of questions concerning a wide variety of institutional practices which are beyond the scope of this paper. Guidelines are now being considered which may resolve some of these questions. However, the clear language of the statute now prohibits the extra-institutional release of any personally identifiable information about students in post-secondary education without their written consent, and subjects institutions which violate that prohibition to a possible loss of federal funds. Thus, the question of constitutional arguments against such a release of information to parents in 18 year-old majority states is moot.

CONTRACTUAL RELATIONSHIPS

The most common contractual relationship between the institution and a student is probably a dormitory contract or a lease; almost as common is the promisory repayment of a loan. (Practically none of the institutions surveyed still executed a contract with the student for his education.) The contents of such notes may vary with the financial aid program and state law, as will dormitory contracts. State statutes reducing the age of majority invariably permit 18 year-olds to sign contracts in their own right. Such contracts are enforceable against the signer but not his parents, unless a parent co-signs or guarantees the note or contract.

Institutions frequently neglect this legal distinction. In our survey a number of institutions in states with age 21 majority did not require parental signature, although a contract without such signature is not enforceable. A significant number of schools in states with age 18 majority, on the other hand, do require *parental* co-signers. (In the telephone interviews, these schools were asked whether any responsible individual would be an acceptable co-signer. A near majority stated their insistence on parental signature.)

In the absence of a specific provision in state law, there is no requirement that an institution offer a contract to an individual who will not provide a co-signer. Because many students are actually, as well as legally, emancipated, the University of Wisconsin requires a financially responsible co-signer or guarantor but does not require that person to be a parent or guardian. Many state and federal loan programs have specific provisions concerning co-signers or guarantors.

MEDICAL CONSENT

In most states the lowered age of majority is accompanied by a corresponding reduction in the age at which parental consent is no longer required for medical treatment. Again, respondents to our survey apparently require consent as a matter of policy rather than law. In states which do not require consent beyond age 18 some schools continued to have such requirements, while a large number of institutions in states where majority is still 21 do not require parental consent. The failure of these latter schools to require parental consent may subject them to considerable risk, especially in surgical cases. In situations involving consent for medical treatment, possible conflict of laws touched on in the next section is particularly important.

CONFLICT OF LAWS

In formulating policies involving relationships with students and parents, institutions may need to give close attention to the problem of conflict of laws. Suppose a 19 year-old student from a state with majority at age 21 and a requirement of parental consent for surgical treatment attends a school in a different state with majority at age 18. The student requires and consents to surgical treatment on his own at a college-operated medical facility. Is the consent sufficient? Is the college in danger of suit by the student's parents? Which law governs the case? Or suppose an institution in an 18 year-old majority state contracts directly with a 19 year-old student for student housing, and then mails the contract for signature to the student's home residence, which is in a state where 19 year-olds cannot contract without the written consent of parents. If the student defaults in his payment for housing is the contract enforceable? These situations involve technical legal questions relating to *conflict of laws*. It is not always true that the law of the state in which the student attends school will prevail, although the respondents to our survey who were queried on such questions assumed this to be the case. This is especially true if the student or his parents are legal residents of another state or if transactions between the institution and the student take place in another state. Fortunately, the trend is toward lowering the age of majority uniformly to age 18, but so long as there are differences among the 50 states, the conflict of laws problem will remain. As with other areas discussed thus far, here too the complexity of the subject, and its differing ramifications in different jurisdictions, preclude a detailed discussion; college administrators should investigate the matter with legal counsel versed in the laws of their jurisdictions.

CONCLUSION

It may well be that the impact of a reduced age of majority will not lead to major constitutional confrontations over such matters as required residence hall living or the definition of independent student. If colleges recognize in advance the potential problems, they may be resolved without costly litigation. However, while such problems may be resolved administratively, there are likely to be significant cost-ramifications to the institution. Similarly, to the degree that the new adult status of most college students facilitates their early establishment of in-state residence in their own right, the age of majority change will have a financial impact on tuition income and state student loan programs which are tied to residence.

Responses to the survey suggest that the lowered age of majority has had a variable impact on institutions, ranging from those where it has had "remarkably little effect" to others where "we had to examine everything in light of the age of majority." It is also possible that in some institutions the impact has been delayed and systematic policy has not emerged. Some student affairs officials who responded to the survey felt that the increased emphasis on dealing with students as adults was healthy and educationally desirable; others disagreed. But many institutions have taken advantage of the Twenty-sixth Amendment and subsequent state legislation lowering the age of majority to revise or eliminate some of their paternalistic rules and regulations.

The ultimate impact of the reduction in the age of majority will not be known for some time. Its impact presently, however, does not seem to be as great as initially anticipated.

Footnotes

[1]The exact date of ratification is July 7, 1971, F.R. Doc. 71-9691, 36 F.R. 12725 (1971).

[2]U.S. Const. Amend. XXVI.

[3]" 'Early Adulthood' Statutes Spreading," *Christian Science Monitor*, October 3, 1973; see also *State Government News*, September 1974, reporting lowering of age of majority in New York. Majority is defined as "the age at which, by law, a person is entitled to the management of his own affairs and to the enjoyment of civic rights." *Black's Law Dictionary* 1107 (4th ed. 1968).

[4]The Council on State Governments, *The Age of Majority (Updated)* 1 (1973).

[5]See sources cited in notes 2 & 3, *supra*.

[6]*E.g.* Colorado (c. 158, Sess. L. 1963); Connecticut (P.A. No. 127, 1972); North Dakota (L. 1971, c. 145, L. 1973, c. 120).

[7]*E.g.* California (c. 1748, Laws 1971); Iowa (L. 65th G.A., 1973 Sess., c. 140).

[8]*E.g.* Indiana (1973 P.L. Nos. 150, 251, 252, 326, etc.).

[9]*The Age of Majority (Updated)*, *supra* note 4, at 4 *ff.*

[10]*See id.* at 13 for a listing of the age of majority legislation for all states summarized in tabular form.

[11]Approximately 40 percent of the people between the ages of 18 and 24 are enrolled in institutions of higher education. Carnegie Commission on Higher Education, *Higher Education: Who Pays? Who Benefits? Who Should Pay?* 44 (1973).

[12]*See* Young, *Ramifications of the Age of Majority* (1973).

[13]*E.g.* Brown v. Board of Education, 347 U.S. 483 (1954).

[14]*E.g.* Meredith v. Fair, 305 F.2d 343 (5th Cir.) *cert. denied* 371 U.S. 828 (1962); the regulation merely required that any applicant for admission to the university provide references from two alumni, however, there were no black alumni of the school, hence no black applicant could meet this requirement.

[15]*E.g.* Wieman v. Updegraff, 344 U.S. 183 (1952).

[16]*See generally*, "Developments in the Law – Academic Freedom," 81 *Harv. L. Rev.* 1045 (1968); "Private Government on the Campus-Judicial Review of University Expulsions," 72 *Yale L.J.* 1362 (1963); Wright, "The Constitution on the Campus," 122 *Vand. L. Rev.* 1027 (1969).

[17]Healy v. James, 408 U.S. 169 (1972).

[18]Papish v. University of Missouri Curators, 410 U.S. 667 (1973) (*per curiam*).

[19]One of the first "students rights" cases, Tinker v. Des Moines School Dist., 393 U.S. 503 (1969), was decided in the context of high school and junior high school students. Subsequent cases such as *Healy* have rearticulated the principles set forth in *Tinker* without noting the distinction in the students age or legal status.

[20]While this paper examines questions of the import of the changed age of majority under *federal* constitutional doctrines, administrators and counsel should be aware that all *state* constitutions also contain bills of rights which, together with state statutes, may form the basis for additional challenges to institutional rules.

[21]*See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Civil Rights Cases, 109 U.S. 3 (1883).

[22]U.S. Const. Amend. XIV.

[23]Moose Lodge No. 107 v. Irvis, *supra; see also* Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

[24]*Cf.* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

[25]*Id., see* Note, 1973 *Wis. L. Rev.* 612.

[26]*See* Marsh v. Alabama, 326 U.S. 502 (1946) ("company town," although privately owned, exercises governmental power in forbidding distribution of leaflets and is thus subject to constitutional constraints); *see also* Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

[27]This trend against finding state action may be changing, *see* Jackson v. The Statler Foundation, 496 F.2d 623 (2d Cir. 1974), *but compare* Barrett v. United Hospital, Inc., 376 F. Supp. 791 (S.D.N.Y. 1974).

[28]For extended discussion of this problem, *see generally* Note, "An Overview: The Private University and Due Process," 1970 *Duke L.J.* 795; Note, "Private Universities: The Courts and the State Action Theories," 29 *Wash. & Lee L. Rev.* 320 (1972); O'Neil, "Private Universities and Public Law," 19 *Buffalo L. Rev.* 155 (1970); Hendrickson, "State Action and Private Higher Education," 2 *J. Law & Ed* 53 (1973).

[29]*Healy, supra; Papish, supra,* Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969); Dixon v. Alabama State Board of Education, 294 F. 2d 150 (5th Cir. 1961); Soglin v. Kaufman, 418 F. 2d 163 (7th Cir. 1969).

[30]Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972).

[31]*See generally,* Van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law," 81 *Harv. L. Rev.* 1439 (1968).

[32]*See e.g.,* Cleveland Board of Education v. LaFleur, 414 U.S. 905 (1974); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1973); *see generally,* Note, "The Irrebuttable Presumption Doctrine in the Supreme Court," 87 *Harv. L. Rev.* 1534 (1974).

[33]*LaFleur, supra.*

[34]Dunn v. Blumstein, 405 U.S. 330 (1972); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[35]Griffin v. Illinois, 351 U.S. 12 (1956); *see also* Douglas v. California, 372 U.S. 353 (1972).

[36]Shapiro v. Thompson, 394 U.S. 618 (1969); Memorial Hospital, Inc. v. Maricopa County, 415 U.S. 250 (1974).

[37]*See* N.A.A.C.P. v. Button, 371 U.S. 415 (1963).

[38]Loving v. Virginia, 388 U. S. 1 (1967); McLaughlin v. Florida, 379 U. S. 184 (1964).

[39]*See* Sherbert v. Verner, 374 U.S. 398 (1963).

[40]Korematsu v. United States, 323 U.S. 214 (1944).

[41]*See generally,* "Developments in the Law—Equal Protection," 82 *Harv. L. Rev.* 1065 (1969).

[42]*Korematsu, supra.*

[43]*See* Hansen & Weisbrod, *Benefits, Costs, and Finance of Public Higher Education* 117 (1969).

[44]45 C.F.R. §190.42 (a).

[45]As pointed out in the above discussion, the Fourteenth Amendment applies to "state" action and hence is not directly applicable to the federal regulations which may be implemented by private colleges, *cf.* District of Columbia v. Carter, 409 U.S. 418 (1973). However, the Supreme Court has held that the Fifth Amendment, which is applicable to the federal government's activities, includes an implicit equal protection element, Bolling v. Sharpe, 347 U.S. 497 (1954); U.S.D.A. v. Moreno, 413 U.S. 528, 540 (1973) (Douglas, J., concurring).

[46]*See* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 18-29 (1973).

[47]*Cf.* Jefferson v. Hackney, 406 U.S. 535 (1972); Dandridge v. Williams, 397 U.S. 471 (1971).

[48]411 U.S. 1 (1973).

[49]Recently the court has, in cases involving equal access to education, *Rodriguez, supra*, note 41; access to housing, *Lindsey v. Normet*, 405 U.S. 56 (1972); and allocations of welfare benefits, *Dandridge v. Williams*, 397 U.S. 471 (1970); *Jefferson v. Hackney*, 406 U.S. 535 (1972), had an opportunity to expand the concept of "fundamental interests" and has declined to do so.

[50]See cases cited note 32 *supra.*

[51]412 U.S. 441 (1973).

[52]*Cf. LaFleur, supra;* Truax v. Raich, 239 U.S. 33 (1915).

[53]*See, e.g.*, 20 U.S.C. §401 (1970).

[54]*See* 45 C.F.R. §190.42(a) (1974).

[55]See discussion from Vlandis v. Kline, 412 U.S. 441 (1973), *infra.*

[56]U.S.D.A. v. Moreno, 413 U.S. 528 (1973).

[57]Hensley, "The Self-Supporting Student, Trends and Duplications," *College Board Report*, Dec. 1973.

[58]Carbone, "Quotas and Dollars: The Squeeze on Non-resident Students," 5 *Compact* (Oct. 1971); Carbone, *Students and State Borders* (1973).

[59]*Students and State Borders, supra*, note 58.

[60]*Id.* at 20.

[61]326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.* 401 U.S. 985 (1971).

[62]412 U.S. 441 (1973).

[63]*Id.* at 452-53 (footnote omitted).

[64]*Id.*, n. 9.

[65]368 F. Supp. 38 (W.D. Wash. 1973), *aff'd mem.* 414 U.S. 1057 (1973).

[66]411 U.S. 1 (1973).

[67]368 F. Supp. at 41.

[68]Conn. Public Act No. 5, §126(a)(2)(1971).

[69]Conn. Public Act No. 5, §126(a)(5)(1971).

[70]Connecticut had asserted that the act distinguished between "new" and "established" residents. The court was doubtful that the asserted purpose was served in the case of a lifelong Connecticut resident who, while attending an out of state institution, applied to the University of Connecticut's graduate school or the married person who moved to Connecticut one day before applying. The "established" applicant would be a non-resident, the "new" applicant a resident.

[71]*Vlandis, supra* 412 U.S. at 453-454.

[72]*Id.* at 454.

[73]The *Vlandis* decision was criticized strongly for ignoring the right to travel recognized in Shapiro v. Thompson, 394 U.S. 618 (1969), by Lawrence Tribe in "The Supreme Court, 1972 Term Forward: Toward a Model of Roles in the Due Process of Life and Law," 87 *Harv. L. Rev.* 1. The court has not extended the right to travel principle, *see* Memorial Hospital, Inc. v. Maricopa County, *supra* note 34.

[74]Carbone, *Students and State Borders, supra* note 58, at 11.

[75]*Id.*, at 53-55.

[76]"Adults at 18," *Time*, July 9, 1973, at 30.

[77]*Young, supra* note 12.

[78]Recent articles have suggested a reversal of this trend, in part due to inflation hitting the private sector harder and a relaxation of residence halls rules. 8 *Chronicle of Higher Education* 4 (1974). Whether this trend will continue is open to question.

[79]Some locally conducted studies have shown that the grade points of dormitory residents are higher than comparable groups of non-residents.

[80]316 F. Supp 872 (W.D. La. 1970), *appeal dismissed* 401 U.S. 951, *aff'd mem.* 401 U.S. 1004 (1971). Judge Ainsworth dissented, 316 F. Supp. at 886.

[81]316 F. Supp. at 876-77.

[82]*Id.* at 885.

[83]304 F. Supp. 826 (E.D. La. 1969).

[84]*Id.* at 827-28.

[85]359 F. Supp. 1137 (W.D. Mich. 1972).

[86]*Id.* at 1142.

[87]*Id.*

[88]343 F. Supp. 1101 (W.D. La. 1972), *aff'd as modified*, 496 F.2d 1285 (5th Cir. 1974).

[89]*Id.* at 1104-05.

[90]*Id.* at 1106.

[91]*Id.*

[92]*Id.* at 1107.

[93]In *Cooper*, Judge Dawkins intimated agreement with the position that compelling "a person of *full legal majority* [to] live in an institutional environment may [interfere with] . . . a 'fundamental right'," 343 F. Supp. at 1110. (Emphasis in original).

[94]369 F. Supp. 778 (D.S.D. 1974); *supplemental opinion*, 63 F.R.D. 9 (D.S.D. 1974); rev'd F. 2d (8th Circuit Dec. 6, 1974).

[95]369 F. Supp. at 781 (emphasis in original).

[96]*Id.* at 780 (emphasis in original).

[97]*Prostrollo*, *supra*, F. 2d

[98]*Cf.* U.S.D.A. v. Moreno, 413 U.S. 528, 541-45 (1974) (Douglas, J., concurring).

[99]414 U.S. 907 (1974) Justice Douglas, who authored the opinion in *Boraas*, had previously indicated in *Moreno*, *supra* note 98, that the First Amendment would be implicated in such circumstances.

[100] F. 2d . In its decision *Prostrollo* the Eighth Circuit raised and disposed of both the privacy and association arguments raised by the students, relying heavily on the *Boraas* decision on the association issue.

[101]Thus far all of the decided cases have involved dormitories at public, state-supported institutions.

[102]Not all of the institutions surveyed responded to all questions submitted; this was particularly true where the survey was by telephone, and interruptions, etc., might terminate an interview. Where less than the entire sample responded to a question, the size of the sample was adjusted to equal 100% response. The overall response to the surveys was 72%.

[103]This survey was conducted, and the results tabulated and conclusions drawn, prior to New York's lowering the age of majority to age 18. The colleges in the sample have not been adjusted, as at the time of the interviews/responses, the respondents were generally unsure of the prospect for reduced age of majority in New York, and did not respond with any changes in policy taken in anticipation of a reduced age of majority.

[104]Education Amendments Act of 1974, §438.

[105]*Id.*, §438(d).

[106]*Id.*, §438(b)(1).